IN THE HIGH COURT OF JUDICATURE AT BOMBAY

TESTAMENTARY & INTESTATE JURISDICTION

NOTICE OF MOTION NO. 958 OF 2002

IN

MISC. PETITION NO. 64 OF 1999

IN

TESTAMENTARY PETITION NO. 1000 OF 1997

Malini Sanjay Thakur ... Applicant

Versus

Mrs. Madhu N. Shrivastav & Anr. Respondents

Mr. A.J.Almeida for Applicant.

Mr. A.K.Tripathi i/b. D.R. Mishra for Respondent No.1.

Mrs. Neeta Masurkar for Respondent No.2.

CORAM: S.K.SHAH,J.

DATE: 7th October, 2004.

P.C.

1. This Notice of Motion is taken out by one of the parties to the Consent Terms filed in Misc. Petition No.64 of 1999 which was the Petition for revocation of the Succession Certificate granted in Testamentary

Petition No. 1000 of 1997

2. Testamentary Petition No.1000 of 1997 was filed by Respondent No.1 for getting succession certificate in respect of the service dues payable to Nirankar J. Akela Shrivastava who was the Railway employee. The present Applicant - Malini Sanjay Thakur, is the daughter of the deceased who was not made party to the succession certificate Petition. The Succession Certificate came to be granted on 23.1.1998. Thereafter the present Applicant - Malini Sanjay Thakur, the daughter of the deceased, filed Misc. Petition No.64 of 1999 for revocation of the said Succession Certificate. It is pertinent to note that the Applicant had already filed Testamentary Petition No.312 of 1999 for getting succession certificate in respect of the service dues payable to her deceased father.

3. Consent Terms were filed in Misc. Petition No.64 of 1999. The parties to the Consent terms were the Applicant, the Respondent No.1 and Meena Shrivastav, who happened to be the daughter of the Respondent No.1 from her first husband (and not the deceased). Those Consent Terms were taken on record in Misc. Petition No.64 of 1999 and by order dated 9.3.2000, the said Misc. Petition No.64 of 1999 and Petition No.312 of

1999 were disposed of in terms of the Consent Terms and it was directed to grant extension to the grant of succession certificate to the petitioners, viz. all the three parties in Petition No.1000 of 1997. Accordingly, the amended succession certificate was issued on 23.8.2000.

4. The present Notice of Motion is filed by the Applicant, who was party to the Consent Terms, on the basis of which Succession Certificate was issued. The Applicant claims that the order passed by this Court on 9.3.2000, as aforesaid, be revoked and Misc. Petition No.64 of 1999 and Petition No.312 of 1999 be restored to file and same be heard on merits on the ground that she signed the Consent Terms as a result of misrepresentation and fraud practised upon her by the Respondent No.1.

5. The Applicant alleges that the Respondent No.1 approached her through Advocate and prevailed upon her for settling the matter with the Respondent No.1 failing which the Respondent No.1 shall see to it that the Applicant does not get anything in the matter and that Respondent No.1 would continue to litigate with the Applicant and would also harass her. The Applicant being a lady and she being 20 years of age and newly married and as her husband and in-laws were

not in favour of fighting litigation in Court, she succumbed to the misrepresentations and fraud as practised upon her by Respondent No.1 and,therefore, signed the Consent Terms. It is further alleged that Respondent No.1 has produced the Certificate of Marriage showing that her marriage with the deceased took place on 15.3.1975. In fact, the deceased was a widower aged 47 years and had married for the first time on 10.8.1977. It was further alleged that Respondent No.1 had described herself as unmarried and aged 19 years when in fact she was married to one Kasamuddin Khan from whom she had a daughter, Meena, who was party to the Consent Terms. The Respondent No.1 had obtained the Marriage Certificate by practising fraud. She further alleged that Respondent No.1 was shown as nominee of the deceased a few days prior to his death and Respondent No.1 practised fraud at that time also. In fact, the deceased had executed a Will dated 2.7.1997 and he was 47 years of age. Respondent No.1 also made incorrect and false statements in her reply to the Applicant's Misc. Petition No.64 of 1999. Under all these circumstances, the Applicant claims that the order dated 9.3.2000 passed on the basis of the Consent Terms be set aside.

6. In the Reply filed by the Respondent No.1, there

is only denial to all these allegations and nothing more.

7. I have heard learned Counsel on both sides. Learned Counsel for the Respondent No.1 vehemently submitted that once the main application, being Misc. Petition No.64 of 1999 was disposed of, the Notice of Motion cannot be entertained in the same proceedings.

8. As against this, the learned Counsel for the Applicant submits that under Section 151 of the Code of Civil Procedure, this Court can entertain such Notice of Motion in the same proceedings in which the Consent Terms were filed.

9. It is clear that the Consent Terms were filed and those Consent Terms are being challenged on the ground of misrepresentation and fraud and, therefore, such Notice of Motion can be entertained in exercise of power under Section 151 of the C.P.C. for setting aside the order passed by this Court based on the Consent Terms.

10. On perusal of the Applicant's affidavit-in-support of the Notice of Motion, it is made clear that there are number of suspicious circumstances with regard to the fact that Respondent

No.1 was, in fact, married to the deceased and considering her to be the widow of the deceased to make claim to the service dues payable to the deceased. It was not in dispute that the Applicant is the daughter of the deceased. The grounds made out by the Applicant of false representation and fraud practised by the Respondent No.1 at the time of execution of the Consent Terms are having substance. The Applicant is a young lady and it is probable that she may have been overcome by the Respondent No.1 with threat being given that she will be harassed by drawing her into litigation if she did not consent to what the Respondent No.1 says. Moreover, there are highly suspicious circumstances creating doubt about Respondent No.1 being the widow of the deceased. Even the Railway Authorities have made enquiries about the same and found the status of the Respondent No.1 suspicious.

11. In these circumstances, the Notice of Motion is allowed. The order passed by this Court on 9.3.2000 on the basis of the Consent Terms is hereby set aside. The Misc. Petition No.64 of 1999 and Petition No.312 of 1999 stand restored to file. Both these Petitions to be proceeded in accordance with law.

(S.K.SHAH,J.)